Petition

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NO. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JIMMY D. PICKETT, R. G. CARTER AND FRANK J. DAVIES, as Co-Executors of the Estate of CLAIRE BENZ-STODDARD, Deceased, and as Trustees of the VAUGHAN BENZ AYERS Trust and the ALLAN BENZ Trust,

Petitioners,

v.

REPUBLIC NATIONAL BANK OF DALLAS, Trustee,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

JOHN E. AGNEW
CHARLES M. WILSON, III
CARTER, JONES, MAGEE,
RUDBERG, MOSS & MAYES
2400 One Main Place
Dallas, Texas 75250
(214) 742-6261

Attorneys for Petitioners

QUESTION PRESENTED FOR REVIEW

Where a nine-judge State Supreme Court follows a "Rule of Three" (granting writs of error as a matter of right only upon the affirmative vote of three members), and where one judge is recused and a writ of error is denied, does the application of the "Rule of Three" by an eight-member court deny the appellant due process of law under the Fourteenth Amendment of the United States Constitution?

PARTIES TO THE PROCEEDINGS

The names of all parties to the proceeding are contained in the caption of the case in this Court.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties to the Proceedings	i
Table of Contents	ii
Table of Authorities	iv
Opinions Below	1
Jurisdictional Grounds	1
Constitutional Provisions Which this Case Involves	2
Statement of the Case	3
Summary of Argument	7

Argument:

I. Where all nine judges of a State Supreme Court routinely sit to review applications for Writs of Error and the Court follows a "Rule of Three" requiring three votes to grant such a writ, and where one judge is recused and the appeal is denied, the application of the "Rule of Three" by an eight-member Court denies the appellant due process of law under the Fourteenth Amendment of the United States Constitution 8

A. Applications for Writs of Error in Texas Invoke Appellate Review as a Matter of Right 9

B. It is Arbitrary to Accord a Significantly Different Decision Process to Random Appellate Cases 10

Page

C. Applying a Rule of Three-in-Eight is Analogous to Eliminating Jury Unanimity 14

D. Judicial Disqualification for Interest Implies a Right to Replacement 15

E. If Legislative Process Requires Mathematical Equality, Judicial Process Should Demand No Less 16

Conclusion 17

Appendices:

A. Opinion Below of the Supreme Court of Texas

B. Petitioners' Motion for Rehearing

C. Notice of Denial of Rehearing

D. Petitioners' Motion for Leave to File

E. Petitioners' Second Motion for Rehearing

F. Letter Refusing Filing

G. Affidavit of Clinton Foshee

H. Letter Explaining Recusal

TABLE OF AUTHORITIES

	Page
CASES:	
Bell v. Burson, 402 U.S. 535 (1971)	13
Bi-Metallic Investment Co. V. State Board of Equalization, 239 U.S. 441 (1915)	16
Burch v. Louisiana, 441 U.S. 130, 99 S. Ct. 1923 (1979)	14
Cleveland Board of Education v. LaFleur, 414 U.S. 632, 39 L.Ed.2d 52, 94 S. Ct. 791 (1974)	13
Colgrove v. Battin, 413 U.S. 149, 37 L.Ed.2d 522 93 S. Ct. 2448 (1973)	14
Friedman v. Rogers, 440 U.S. 1, 59 L.Ed.2d 100, 99 S. Ct. 887 (1979)	15
Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed.2d 556, 92 S. Ct. 1983 (1972)	12
Gibson v. Berryhill, 411 U.S. 564 (1973)	15
Griffin v. Illinois, 351 U.S. 12, 18, 100 L.Ed. 891, 76 S. Ct. 585 (1956)	9
Josephson v. United States, 333 U.S. 838 (1948)	9
Kirkpatrick v. Preisler, 394 U.S. 526, 531, 22 L.Ed.2d 519, 524, 89 S. Ct. 1225 (1969)	16
Kuykendall v. Southern Ry. Co., 652 F.2d 391 (4th Cir. 1981)	15
Londoner v. Denver, 210 U.S. 373 (1908)	16
Matthews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S. Ct. 893 (1976)	14
Nalle v. City of Austin, 22 S.W. 668, 85 Tex. 520 at 537-38, rehearing overruled, 22 S.W. 960, 85	

Page

Tex. 520 (1893) 12

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 42 L.Ed.2d 751, 95 S. Ct. 719 (1975) 12

Ortwein v. Schwab, 410 U.S. 656 (1973) 13

Pickett v. Republic Nat'l. Bank of Dallas, Trustee, 601 S.W.2d 405 (1980) 1

Pryor v. United States, 404 U.S. 1242, 1243, 92 S. Ct. 23, 30 L.Ed.2d 156, 158 (1971) 9

Puryear v. Porter, 153 Tex. 82, 264 S.W.2d 689 (Tex. 1954) 5

Reynolds v. Sims, 377 U.S. 533 (1964) 16

Ross v. Moffit, 417 U.S. 600, 613-614, 41 L.Ed.2d 341, 94 S. Ct. 2437 (1971) 9

Scarborough v. Pennsylvania R.R., 326 U.S. 755 (1945) 9

Stanley v. Illinois, 405 U.S. 645, 31 L.Ed.2d 551, 92 S. Ct. 1208 (1972) 13

Thompson v. Gibbs, 150 Tex. 315, 240 S.W.2d 287 (1951) 10

Tumey v. Ohio, 273 U.S. 510 (1927) 15

United States ex rel Brensilber v. Bausch & Lomb Optical Co., 320 U.S. 711, 88 L.Ed. 417 (1943) 13

United States Dept. of Agriculture v. Murry, 413 U.S. 508, 37 L.Ed.2d 767, 93 S. Ct. 283 (1973) 12

Vlandis v. Kline, 412 U.S. 441 (1973) 13

Ward v. Monroeville, 409 U.S. 57 (1972) 15

Williams v. Florida, 399 U.S. 78 at 101, n. 48, 26 L.Ed.2d 446, 90 S. Ct. 1893 (1970) 14

	Page
CONSTITUTIONAL PROVISIONS:	
United States Constitution	
Fourteenth Amendment	2
Texas Constitution	
Art. 5, § 2	12
Art. 5, § 11	2, 11
FEDERAL STATUTES:	
28 U.S.C. § 1257(3)	2
28 U.S.C. §§ 2101(c)	2
RULES:	
Federal	
U. S. Sup. Ct. R. 20.4, 28 U.S.C.A.	2
State	
Tex. R. Civ. P. 468 (1981)	10
Tex. R. Civ. P. 472 (1981)	10
Tex. R. Civ. P. 483 (1981)	10
OTHER AUTHORITIES:	
J. Greenhill, *Advocacy in The Texas Supreme Court*, 44 Tex. Bar J. 624, at 626 (No. 6, June, 1931)	5, 10, 11
F. James and G. Hazard, *Civil Procedure* § 8.12 at 391 (2d ed. 1977)	14
Leiman, *The Rule of Four*, 57 Colum. L. Rev. 975 (1957)	9

Page

Lempert, *Uncovering "Nondiscernable" Differences: Empirical Research and the Jury-Size Cases*, 73 Mich. L. Rev. 643 (1975) 14

12 J. Moore, *Federal Practice* ¶400.05-2[4] (1980) 10

J. Nowak, R. Rotunda, J. Young, *Constitutional Law* 499 (1978) 8

O. C. Walker, ed., *Appellate Procedure in Texas* (Tex. Bar Found. 1979) ch. 25, 26, 27 ..... 5, 10

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REPUBLIC NATIONAL BANK OF DALLAS, Trustee,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The Petitioners, Jimmy D. Pickett, et al., respectfully request that a writ of certiorari issue to review the judgment of the Supreme Court of Texas, entered in the above entitled case on May 27, 1981.

OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals is reported in *Pickett v. Republic Nat'l. Bank of Dallas, Trustee*, 601 S.W.2d 405 (1980). The opinion of the Texas Supreme Court refusing the Writ of Error is not yet reported, and appears in App. A.

JURISDICTIONAL GROUNDS

The Supreme Court of Texas refused the Petitioners' Application for Writ of Error on May 27, 1981 (App. A, p. 2). The Petitioners' Motion for Rehearing was timely filed on June 12, 1981 (App. B, p. 1) and was denied on June 30, 1981 (App. C).

The Petitioners submitted a Motion for Leave to File (App. D), accompanied by a Second Motion for Rehearing on July 8, 1981 (App. E). By letter dated

July 15, 1981, the Clerk of the Texas Supreme Court refused to file the Motion and returned it to the Petitioners. (App. F)

In its Second Motion for Rehearing, the Petitioners raised the objection that the Rule of Three practice, when applied by eight members of a nine-member court, denies due process of law under the United States Constitution. (App. E, p. 2)

This Court has jurisdiction under 28 U.S.C. §1257(3) on the grounds that Petitioners have claimed a right under the Constitution of the United States. This Petition for Certiorari has been timely applied for within ninety days of June 30, 1981, the date of the denial of a timely filed Motion for Rehearing. 28 U.S.C. §§ 2101(c); U.S. Sup. Ct. R. 20.4, 28 U.S.C.A.

CONSTITUTIONAL PROVISIONS WHICH THIS CASE INVOLVES

The Fourteenth Amendment of the United States Constitution provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 5, § 11 of the Texas Constitution provides:

> § 11. Disqualification of judges; exchange of districts; holding court for other judges

Sec. 11. No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case. When the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, or any member of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes. When a judge of the District Court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law.

And the District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. This disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled as may be prescribed by law. As amended Aug. 11, 1891, proclamation Sept. 22, 1891.

STATEMENT OF THE CASE

The Texas Court of Civil Appeals affirmed a summary judgment rendered in the trial court in favor of the plaintiff Republic National Bank of Dallas, Trustee, who is the Respondent here. Under Texas law, Jimmy D. Pickett, et al, the defendants in the trial court, who are now the Petitioners in this Court,

made an Application for Writ of Error to the Supreme Court of Texas. The Supreme Court of Texas delivered a Per Curiam decision on May 27, 1981, refusing the writ. The Supreme Court opinion stated in part:

> "The Court of Civil Appeals properly affirmed the trial court's judgment. The application for Writ of Error is refused, no reversible error. . . . Chief Justice Greenhill not sitting." (App. A, p. 2)

This constituted the first notice to the Petitioners that Chief Justice Greenhill had not participated in the decision of the Texas Supreme Court to affirm the Court of Civil Appeals judgment and to refuse the Application for Writ of Error. The defendants, the Petitioners here, by June 10, 1981, prepared and mailed a Motion for Rehearing, which was filed on June 12, 1981. (App. B) This Motion pointed out errors on the merits in the Supreme Court opinion affirming the Court of Civil Appeals' decision. On June 30, 1981, the Clerk of the Supreme Court mailed a notice to the defendants stating that the Motion for Rehearing was this day overruled, "(Chief Justice Greenhill not sitting)". (App. C)

Counsel for the defendants determined that presumably the reason why Chief Justice Greenhill had not participated in the decision of the Texas Supreme Court was that his wife owned stock in the Republic National Bank of Dallas and that he therefore had recused himself. (App. G and H) On July 7th, counsel for defendants had prepared and mailed a Second Motion for Rehearing in the Supreme Court of Texas. This Second Motion for Rehearing challenged the practice of applying the Rule of Three in an eight-member

court and stated: "Petitioners have unconsciously been denied constitutional protections guaranteed by the Constitution of the State of Texas as well as that due process required by the Constitution of the United States of America." (App. E, p. 2) The Petitioners' Motion for Leave tc File its Second Motion for Rehearing (App. D) cited as authority *Puryear v. Porter*, 153 Tex. 82, 264 S.W.2d 689 (Tex. 1954) where the Texas Supreme Court did allow a second motion for rehearing and reconsidered and reversed its previous decision. Nevertheless, the Petitioners' Second Motion for Rehearing, by a letter dated July 15, 1981, from the Clerk of the Texas Supreme Court, was returned without being filed on the grounds that: "There being no provision in the Texas Rules of Civil Procedure for a second motion for rehearing, the Court has instructed that same not be filed and returned to movant." (App. F)

The Texas "Rule of Three" is set forth in *Appellate Procedure in Texas* (Tex. Bar Found. 1979) in ch. 27, "Application for Writ of Error", § 27.9 "Action on Application" at p. 613:

> "Once the [Supreme Court of Texas] is satisfied that jurisdiction exists and has been invoked, attention turns first to the question of whether the application should be granted. If as many as three justices so vote, the application is granted, and the case is put on the submission docket. If no more than two justices vote to grant, the application is 'Refused' or 'Refused, No Reversible Error'."

Chief Justice Joe Greenhill confirms this practice in his recent article, *Advocacy in The Texas Supreme*

Court, appearing in 44 Tex. Bar J. 624, at 626 (No. 6, June, 1981), where he states:

"Action on Application

"All nine of us sit on every application. If three of us are of the tentative view that the *judgment* of the court of civil appeals is wrong, the writ will be granted."

SUMMARY OF ARGUMENT

I. Where all nine judges of a State Supreme Court routinely sit to review applications for Writs of Error and the Court follows a "Rule of Three" requiring three votes to grant such a writ, and where one judge is recused and the appeal is denied, the application of the "Rule of Three" by an eight-member court denies the appellant due process of law under the Fourteenth Amendment of the United States Constitution.

A. Applications for Writs of Error in Texas Invoke Appellate Review as a Matter of Right.

B. It is Arbitrary to Accord a Significantly Different Decision Process to Random Appellate Cases.

C. Applying a Rule of Three-in-Eight is Analogous to Eliminating Jury Unanimity.

D. Judicial Disqualification for Interest Implies Rights to Replacement.

E. If Legislative Process Requires Mathematical Equality, Judicial Process Should Demand No Less.

ARGUMENT

I.

Where all nine judges of a State Supreme Court routinely sit to review applications for Writs of Error and the Court follows a "Rule of Three" requiring three votes to grant such a writ, and where one judge is recused and the appeal is denied, the application of the "Rule of Three" by an eight-member court denies the appellant due process of law under the Fourteenth Amendment of the United States Constitution.

The reason certiorari should be granted in this case is that the practice followed by the Supreme Court of Texas is in conflict with decisions of this Court establishing fundamental principles of the Fourteenth Amendment requiring fair procedure as between classes of litigants, non-arbitrary treatment in their pursuit of the rights to appeal as granted under the state law, and timely notice so that they may protect their rights.

We may begin with the concession that "[t]o date the Supreme Court has never found a right to appeal as inherent in the right to due process of law."[1] But the same authors go on to say, "[w]here access to the judicial process is not essential to the exercise of fundamental constitutional rights the state will be free to allocate access to the judicial machinery on any system or classification which is not totally arbitrary."[2] The Petitioners submit that application of the Rule of Three by eight members of a nine-member court, when a practical alternative exists, is fundamentally arbitrary.

1. J. Nowak, R. Rotunda, J. Young, *Constitutional Law* 499 (1978).

2. *Id.* at 513.

A. Applications for Writs of Error in Texas Invoke Appellate Review as a Matter of Right.

At the outset it should be noted that this Petition does not raise the same issue as would be raised by a due process attack upon the United States Supreme Court's "Rule of Four" practice in granting petitions for certiorari. Under its certiorari practice, where there are two seats vacant, the usual practice of the United States Supreme Court is to require only three votes, rather than the usual four.[3] But when only one seat on the United States Supreme Court is vacant, the eight-member Court continues to decide petitions for certiorari according to the "Rule of Four".[4] This practice presumably does not constitute a denial of due process of law.[5]

Nevertheless, there is a clear distinction between the petitioner's privilege to seek and obtain review by certiorari, which is in its nature a purely discretionary grant,[6] in contrast to the rights granted under Texas state law to an appeal as of right[7] in the Texas Supreme Court, and the actual review which is given to a Texas Application for a Writ of Error. For one example, the denial of the Application for Writ of Error actually

3. *Pryor v. United States*, 404 U.S. 1242, 1243, 92 S. Ct. 23, 30 L.Ed.2d 156, 158 (1971).

4. *Josephson v. United States*, 333 U.S. 838 (1948); *Scarborough v. Pennsylvania R.R.*, 326 U.S. 755 (1945).

5. Leiman, *The Rule of Four*, 57 Colum. L. Rev. 975 (1957).

6. *Id.* at 980; *Ross v. Moffit*, 417 U.S. 600, 613-614, 41 L.Ed.2d 341, 94 S. Ct. 2437 (1971).

7. *Griffin v. Illinois*, 351 U.S. 12, 18, 100 L.Ed.2d 891, 76 S. Ct. 585 (1956).

decides the merits of the appeal,[8] in contrast to the non-precedential effect of the denial of the Writ of Certiorari by the United States Supreme Court.[9]

B. It is Arbitrary to Accord a Significantly Different Decision Process to Random Appellate Cases.

Because the right to appeal is affirmatively granted by Texas law[10] and the determination of that right by nine members of court is routinely granted all Applications for Writs of Error,[11] it is submitted that it is fundamentally arbitrary to give a review by only eight members of the court simply because (without knowledge of the appellant) one member of the court has been disqualified because of an interest in the case. The decision whether to grant the writ as to ordinary cases is made under the Rule of Three with nine members sitting. In such a situation, all appellants in Texas are faced with the necessary task of convincing three out of nine judges that the judgment is wrong.[12] In other

8. *Thompson v. Gibbs*, 150 Tex. 315, 240 S.W.2d 287 (1951) (Where writ is "refused", Court of Appeals opinion has equal precedential value with Supreme Court opinion). In contrast to certiorari practice, the Application for Writ of Error is filed in the Texas Court of Civil Appeals, Tex. R. Civ. P. 468 (1981), and the record is automatically forwarded to the Texas Supreme Court, Tex. R. Civ. P. 472 (1981). Also, the action on the Application ordinarily determines the merits of the judgment below. Tex. R. Civ. P. 483 (1981).

9. 12 J. Moore, *Federal Practice* ¶ 400.05-2[4] (1980).

10. O. C. Walker, ed., *Appellate Procedure in Texas*, ch. 27, (Tex. Bar Found. 2d ed. 1979); see also, ch. 25 and ch. 26.

11. *Id.*, § 27.9 at 613; J. Greenhill, *Advocacy in the Texas Supreme Court*, 44 Tex. Bar J. 624, at 626 (No. 6, June, 1981).

12. *Ibid.*

words, the appellants' theoretical chances of having the writ granted, all other things being equal, are three in nine, or one in three. However, in another small category of cases on appeal in the judicial system of Texas, selected totally at random and arbitrarily according to the fortuitous circumstances that one member of the Texas Supreme Court happens to have an interest in the case, a significantly different decision process is applied. In such a category of case, the appellant must now convince three out of eight judges rather than three out of nine judges that the judgment below is wrong. In other words, all things being otherwise equal, the odds against the appellant have been increased 12.5%. [13] Particularly when Texas state law may provide a mechanism for filling a vacancy upon recusal, [14] the result is that some appellants' cases are accorded a different decision process, through no preventable fault of their own, on a totally random basis. This amounts to an arbitrary denial of the affirmative right to appeal under state law.

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13. The olds against the average Texas appellant are 3 to 9. The odds against the appellant, where one judge has been recused, are 3 to 8. Therefore: 3 : : 9 is to 1 as 3 : : 8 is to X. This formula yields 12.5% greater odds against the appellant in the case of an eight-member court.

    The historical odds are much lower because the Court in fact only votes to grant the writ in one out of six or seven Applications. Greenhill, *supra*, n. 11.

14. Art. 5, § 11 of the Texas Constitution provides:

    "No judge shall sit in any case wherein he may be interested . . . . When the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, or any member of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes."

This case fits within that line of United States Supreme Court decisions holding that when the state chooses to grant a right it may not draw an arbitrary line on the enforcement of that right by making an irrebuttable presumption against someone who would otherwise be in the included class.[15] The "Rule of Three" as applied by an eight-member court, unthinkingly presumes that the appellant is being given the

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This section has been interpreted to mean something other than what it literally says, at least as to recusals in the three-member Court of Civil Appeals. In *Nalle v. City of Austin*, 22 S.W. 668, 85 Tex. 520 at 537-38, rehearing overruled, 22 S.W. 960, 85 Tex. 520 (1893), the Supreme Court of Texas very early decided that the Texas framers only intended § 11 to apply to the Court of Civil Appeals when, in that three-person court, by virtue of a recusal, the remaining two were deadlocked and could not reach a decision. However, the Petitioners have not been able to locate a case where the same interpretation has been applied to recusals in the nine-member Supreme Court of Texas. The argument can be made that in spite of the quorum section, Art. 5, § 2, the Texas Constitutional intent of § 11 is different in the case of the Texas Supreme Court, when it is applying a Rule of Three. That intent could be to give the applicant the right to a nine-member body and thus to allow a certification to the Governor upon a recusal, even when there is no stalemate in the remaining eight. But, because the appellants are not notified of the recusal until after the decision denying their writ, and because there is thus no opportunity to raise this question before the decision is rendered by a body of eight, the question cannot be effectively raised, except by motion for rehearing when, as a practical matter, it is too late. The notice of recusal then does not come at a meaningful time in order to protect potential rights of the appellants in a meaningful way. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 42 L.Ed.2d 751, 95 S. Ct. 719 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S. Ct. 1983 (1972).

15. *United States Dept. of Agriculture v. Murry*, 413 U.S. 508, 37 L.Ed.2d 767, 93 S. Ct. 283 (1973).

same process of law as an appellant's application being decided by a nine-member court. In making this irrebuttable presumption against the truth with no justification, the practice denies due process of law. [16]

It may be argued that after the denial of the writ has been decided, it is purely speculative what the presence of a ninth member would have contributed to the decision process. It may well be that the ninth member would have voted to affirm. Or even with the presence of a ninth member voting to grant the writ, there may not have been two other members who could be influenced by the ninth member to grant the writ. Nevertheless, even if all eight voted against the writ, [17] the effect of the absence of the ninth member cannot be retroactively rationalized. [18] Thus the situation does

16. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 39 L.Ed.2d 52, 94 S. Ct. 791 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Bell v. Burson*, 402 U.S. 535 (1971); *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S. Ct. 1208 (1972).

17. The fact that the decision by the Supreme Court of Texas was "per curiam" does not mean the eight remaining justices were all unanimous and all voted to affirm. See, *e.g.*, *United States ex rel Brensilber v. Bausch & Lomb Optical Co.*, 320 U.S. 711, 88 L.Ed. 417 (1943) (a "per curiam" judgment affirmed by an equally divided court, Justice Jackson not participating); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (a per curiam decision where four Justices of the United States Supreme Court dissented, at 661, 664, 665.) Thus from the record and the practice of the "Rule of Three" in the Texas Supreme Court, its per curiam decision must mean only that there were not three of the eight who thought the lower court decision was wrong, and that there were not three of eight who thought the first and second motions for rehearing should be granted.

18. As stated in the Petitioners' Second Motion for Rehearing, "Remember the Henry Fonda movie 'Twelve Angry Men'?" (App. E, p. 2, n. 2).

not fit within the principle of *Matthews v. Eldridge*,[19] where the requirement of a due process hearing to correct errors in a decision process can be satisfied by a later reconsideration after the decision is made.

C. Applying a Rule of Three-in-Eight is Analogous to Eliminating Jury Unanimity.

In *Colgrove v. Battin*,[20] this Court found that it was not a violation of the Seventh Amendment for a federal District Court by Local Rule to reduce the size of the jury from twelve persons to six persons. The Court recognized that the reduction in total members in some undefined way changed the decision process but since there was " 'no discernible difference between the results reached by the two different sized juries' ", it was not essential to the right of jury trial.[21] But the *Battin* decision clearly did not deal with the question of less-than-unanimous verdicts, and the requirement of unanimity still applies.[22] Thus, if a federal District Court were to change the essential decision process by changing the internal unanimity rule, or were to pick cases at random for assignment to a jury numbering between

19. 424 U.S. 319, 47 L.Ed.2d 18, 96 S. Ct. 893 (1976).

20. 413 U.S. 149, 37 L.Ed.2d 522, 93 S. Ct. 2448 (1973).

21. 37 L.Ed.2d at 530, citing to *Williams v. Florida*, 399 U.S. 78 at 101, n. 48, 26 L.Ed.2d 446, 90 S. Ct. 1893 (1970), and to various empirical studies in f.n. 15. There was nevertheless substantial disagreement. Lempert, *Uncovering "Nondiscernable" Differences: Empirical Research and the Jury-Size Cases*, 73 Mich. L. Rev. 643 (1975).

22. F. James and G. Hazard, *Civil Procedure* § 8.12 at 391 (2d ed. 1977); see *Burch v. Louisiana*, 441 U.S. 130, 99 S. Ct. 1623 (1979) (state conviction by non-unanimous six person jury violated right to jury trial under Fourteenth and Sixth Amendments).

six and twelve with no particular guideline other than the number of jurors in good health at the end of the trial, [23] it is submitted that this would be an arbitrary denial of due process of law in that the standard by which cases would be given one decision process as opposed to another would be essentially capricious. Yet applying a Rule of Three by eight members of a nine-member court essentially does that in this case. That is, a reduction in the total number of members of the body while retaining the absolute internal number of votes necessary for an affirmative vote of the body, as a mathematical certainty reduces the chances of success, [24] not to mention the chances in terms of human factors. [25]

D. Judicial Disqualification for Interest Implies Rights to Replacement.

At some point where there is one decision maker, the nexus between the interest of the decision maker and the subject matter of the action may become so direct that due process is violated by the decision. [26] And where the decision is made by a body, the interest of some members may invalidate the decision. [27] Conversely, it should follow that when due process requires recusal for interest from a body, in the absence of a

23. *Cf. Kuykendall v. Southern Ry. Co.*, 652 F.2d 391 (4th Cir. 1981) (reversing F.E.L.A. verdict rendered by unanimous seven-person jury).

24. See n. 13, *supra*.

25. See n. 18, *supra*.

26. *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Monroeville*, 409 U.S. 57 (1972).

27. *Gibson v. Berryhill*, 411 U.S. 564 (1973); *cf. Friedman v. Rogers*, 440 U.S. 1, 59 L.Ed.2d 100, 99 S. Ct. 887 (1979) (claim was premature).

reason excusing replacement of that member, and with a practical method available for replacement, the system should accord litigants equality of opportunity in the body making the decision to obtain a favorable result.

E. If Legislative Process Requires Mathematical Equality, Judicial Process Should Demand No Less.

Rights to due process of law attach only to judicial decisions [28] and not to legislative decisions. [29] Yet the political right to vote and equal protection of that right require apportionment plans which approach mathematical population equality in the absence of good reasons excusing the lack of equality. [30] By the same token, any litigant's potential due process right to judicial review and chances for a favorable result by a judicial body should approach mathematical equality with the same odds accorded other litigants, when there is no good reason not to follow a practical alternative which would assure such equality. A 12.5% differential [31] would not be acceptable for the legislative branch; it should not be acceptable for the judiciary.

---

28. *Londoner v. Denver*, 210 U.S. 373 (1908).

29. *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915).

30. *Kirkpatrick v. Preisler*, 394 U.S. 526, 531, 22 L.Ed.2d 519, 524, 89 S. Ct. 1225 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964).

31. See n. 13, *supra*.

CONCLUSION

The Supreme Court of Texas has a number of practical alternatives. First, it could at least give notice of the recusal before its decision, in order to give the appellant an opportunity to make an argument for a replacement at a meaningful time in a meaningful way. Second, under a proper interpretation of Art. 5, § 11, the Governor could set up an efficient procedure to appoint a replacement without impairing administration of appeals. Third, the Court could not apply its Rule of Three in such cases and apply instead a Rule of Two. Because there is a failure to give notice of the recusal until after the decision, and because there is a practical alternative available, the Texas Supreme Court "Rule of Three" practice, when applied by eight members of the Court, arbitrarily denies one class of litigants the equal access to appellate reversal as is accorded all other appellants and is therefore a denial of due process of law under the Fourteenth Amendment. Petitioners therefore respectfully request that this Court grant certiorari in this case.

Respectfully submitted,

JOHN E. AGNEW
CHARLES M. WILSON, III
CARTER, JONES, MAGEE,
RUDBERG, MOSS & MAYES
2400 One Main Place
Dallas, Texas 75250
(214) 742-6261

Attorneys for Petitioners

APPENDIX A

IN THE

SUPREME COURT OF TEXAS

NO. B-9689

JIMMY D. PICKETT, R. G. CARTER AND FRANK J. DAVIES, as Co-Executors of the Estate of CLAIRE BENZ-STODDARD, Deceased, and as Trustees of the VAUGHAN BENZ AYERS Trust and the ALLAN BENZ Trust,

Petitioners,

v.

REPUBLIC NATIONAL BANK OF DALLAS,

Respondent.

From Dallas County
Fifth District

PER CURIAM

Republic National Bank, trustee of the J. B. Stoddard and Claire Benz-Stoddard Trust, seeks restitution of funds mistakenly paid to the Estate of Claire Benz-Stoddard.

Republic moved for summary judgment. The Estate answered that under their fiduciary duties they had paid out all money received from Republic and should not be held accountable for Republic's mistake. Summary judgment was rendered for Republic and the Court of Civil Appeals affirmed. 601 S.W. 2d 405.

The Estate complains summary judgment was erroneous. It argues there was a fact issue whether the Estate and Testamentary Trusts changed position to their prejudice after receiving the money. However, there was no summary judgment evidence that the Estate or Testamentary Trusts changed positions or assumed liabilities or obligations they would not otherwise have assumed. The summary judgment evidence was an affidavit stating the money paid to the Estate had been paid out through the Testamentary Trusts. A showing that the Estate no longer has the specific funds is not sufficient to raise a fact issue of prejudicial change of position.

The Court of Civil Appeals properly affirmed the trial court's judgment. The application for Writ of Error is refused, no reversible error. We do not approve the Court of Civil Appeals' discussion or application of *Malooly Brothers, Inc. v. Napier*, 461 S.W.2d 119 (Tex. 1970).

Chief Justice Greenhill not sitting.

OPINION DELIVERED: May 27, 1981.

APPENDIX B

[Supreme Court of Texas filemark date June 12, 1981, omitted in printing]

[Caption, Table of Contents, and List of Authorities omitted in printing]

PETITIONERS' MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioners, JIMMY D. PICKETT, R. G. CARTER AND FRANK DAVIES respectfully submit this, their Motion for Rehearing to correct errors of law committed by the 134 Judicial District Court of Dallas County, Texas, in granting the summary judgment in favor of respondent and those errors committed by the Court of Civil Appeals and this Honorable Court in affirming that judgment.

POINTS OF ERROR
POINT OF ERROR NO. 1

This Court erred in affirming the judgment of the trial court and that of the Court of Civil Appeals since Respondent failed to establish that there was no genuine issue of fact concerning the existence of a "mistake" with reference to their payment.

POINT OF ERROR NO. 2

This Court erred in affirming the summary judgment since the Respondent failed to establish that there was no genuine issue of fact concerning the inequity of Petitioners' retention of payments made.

POINT OF ERROR NO. 3

This Court erred in affirming the summary judgment because the burden of negating the inequity of repayment rested on Respondent and Respondent failed to discharge this burden.

STATEMENT AND BRIEF OF ARGUMENT UNDER POINT OF ERROR ONE

The basis of the Respondent's Motion for Summary Judgment and of the trial court's judgment in favor of the Respondent was a single theory of money had and received. In order to discharge its burden, it was necessary for Respondent to establish that there was no fact issue with reference to each of the following facts:

1. That money was paid to Petitioners;

2. Under a mistake of fact; *and*

3. That it would not be inequitable or unconscionable to Respondent in good conscience and in equity was entitled to restitution.

Staats v. Miller, 243 S.W.2d 686, 687 (1951). All parties agree that money was in fact paid. In their first two points of error as appellants of the Tyler Court of Civil Appeals Petitioners contended that there was no mistake with reference to payment.

The trust instrument provided that "the proceeds derived from the sale of production shall cease and terminate *when all of the following events shall have occurred:*

APPENDIX C

CLERK'S OFFICE - SUPREME COURT

Austin, Texas,

June 30, 1981

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of No. B.-9689: JIMMY D. PICKETT, et al. vs. REPUBLIC NATIONAL BANK OF DALLAS, Trustee, (Chief Justice Greenhill not sitting) was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

[Postmark omitted in printing]

(1) The reserves attributable to the property interest suscribed in the granting clause above, as determined by James A. Lewis Engineering, Inc. or by such other confident engineers as may be agreed upon by assignors and assignees, shall have been reduced to 43,098 barrels of oil, and

(2) Such reserves shall have been reduced to 703,080 M.C.F. of gas, and

(3) Such reserves shall have been reduced to 39,180 barrels of liquid hydro-carbons." (TR54) (emphasis added)

In order for there to be a termination of payment there must first be a determination by James A. Lewis Engineering. That is to say, that the condition precedent for the termination was a determination. There could be no overpayment, or mistake, until after a determination by James A. Lewis Engineering. According to the affidavit of James Bevin, offered by the Respondent, the determination was not made until June, 1977. Accordingly, any payments made prior to the determination as outlined by Mr. Bevins would not be a "mistake" in payment. Since Respondents failed to prove an overpayment they have neglected to prove an essential element in their proof, which should have been fatal to the granting of the summary judgment.

Even if the condition precedent had been established, Respondents would not be entitled to summary judgment since no proper proof was offered establishing that the reserves of gas and liquid hydro-carbon had dropped below the designated level. The trust instrument provides that the reserve of oil must have dropped below a specified level as determined by

James A. Lewis. The instrument is silent as to who is to determine the reserves with reference to the gas and liquid hydro-carbons. Without a proper explanation through proper summary judgment proof as to how the determination of these reserves was made, and termination of trust benefits would clearly be improper.

Republic relied upon an affidavit of an Edwin Cable to support its termination. Mr. Cable's affidavit is devoid of any factual explanation as to how the Lewis analysis was conducted and how such analysis was made with reference to the gas and liquid hydrocarbons. Such omission should have been fatal to the granting of a summary judgment. *E. G. Gibbs v. General Motors Corp.*, 450 S.W.2d 827 (1970); Tex.R.Civ.P. 166-a (c). Respondent has argued that the instrument clearly calls for James A. Lewis Engineering to conduct the analysis with reference to each of the reserves. Petitioners' position is that the instrument is clear only with reference to the oil reserves. Since both constructions could be reasonably advanced, an ambiguity exists. Where an ambiguity exists then a jury question is presented. *Cf. Taylor v. McNutt* 58 Tex. 71 (882); Achterberg v. Gillett, 322 S.W.2d 306 (Tex.Civ.App. El Paso 1959). Obviously a summary judgment would be improper here as well.

POINT OF ERROR NO. 2 (RESTATED)

This Court erred in affirming the summary judgment since the Respondent failed to establish that there was no genuine issue of fact concerning the inequity of Petitioners' retention of payments made.

POINT OF ERROR NO. 3 (RESTATED)

This Court erred in affirming the summary judgment because the burden of negating the inequity of repayment rested on Respondent and Respondent failed to discharge this burden.

STATEMENT AND BRIEF OF ARGUMENT UNDER POINTS OF ERROR TWO AND THREE

As mandated by *Staats, supra,* Respondent must have also shown that it would not be inequitable to require restitution. They must have proved a negative in order to have prevailed on the summary judgment. It was Respondent's burden to have affirmatively shown that there were assets on hand from which Petitioners could seek repayment to discharge this burden. The Court is correct in its opinion that a showing that the specific funds have been paid is not sufficient to discharge this burden. However, the effect of the opinion is to place the burden on Petitioners when, as the movant, it was Respondent's.

Petitioners cannot help but feel that they have been prejudiced by the respondent's attempts to cure their omission by repeated improper reference to post judgment transactions and invalid assumptions. Respondent argued at Page 22 of their reply to Petitioners' original application that there is not a sufficient change of position on the part of the fiduciary *when* the fiduciary holds assets belonging to the beneficiary so that he can repay himself. (emphasis added) Such a statement assumes that fiduciary holds assets belonging to the beneficiary from which he can repay himself. In this case there was no proof whatsoever proffered by the

movant for the summary judgment that such assets were on hand. It was this omission in proof which should have been fatal to the granting of the summary judgment. This assumption was repeated in a following paragraph on the same page of Respondent's brief where they argued that there can be no defense of change of position *so long as* the estate has property from which the judgment can be satisfied. (emphasis added) Again, there is no such proof of the Petitioners' ability for repayment. Respondent attempts to cure this conspicuous omission by referring to the filing by Petitioners of a cash supercedeous bond. Obviously, post-judgment transactions could not have provided any proof with reference to the omission of the essential element at the trial court.

It is crucial to distinguish Respondent's negative burden of showing no inequity from Petitioners' positive burden of showing a change of position. Before a burden could shift to Petitioners, Respondent would first have had to discharge its negative burden. Respondent offered no proof of circumstances that would show restitution would not be inequitable. The affidavit of Jimmy Pickett is therefore immaterial until such time as Respondent discharges its burden. As worded, this opinion contradicts the established precedent of the movants' obligation to discharge the burden in summary judgment proceedings.

PRAYER

WHEREFORE, PREMISES CONSIDERED, your Petitioners pray that this Court grant its Motion for Rehearing and expand the per curiam opinion already written by it and pursuant to Tex.R.Civ.P. 483, without oral argument, reverse the judgment of the Tyler Court of Civil Appeals and the trial court and remand this case to the trial court. Alternatively, if this Court is of the opinion that oral argument would assist it in making a determination, then Petitioners would request that the Motion for Rehearing be granted and that this case be set for oral submission at the earliest practical date, and for such other and further relief to which Petitioners may show themselves justly entitled.

Respectfully submitted,

CARTER, JONES, MAGEE,
RUDBERG, MOSS & MAYES

By /s/ LEE M. TAFT

One Main Place, Suite 2401
Dallas, Texas 75250
(214) 742-6261

ATTORNEYS FOR PETITIONERS

[Certificate of service omitted in printing]

APPENDIX D

[Supreme Court of Texas file mark date July 8, 1981, omitted in printing] [Caption omitted in printing].

PETITIONERS' MOTION FOR LEAVE TO FILE SECOND MOTION FOR REHEARING

TO SAID HONORABLE COURT:

NOW COME JIMMY D. PICKETT, R. G. CARTER and FRANK J. DAVIES, Petitioners herein, and file this, their Motion for Leave to File Second Motion for Rehearing, and respectfully say:

I.

Attached hereto is Petitioners' Second Motion for Rehearing, marked Exhibit "A", which such Motion is based on matters which have arisen since this Court's refusal of Petitioners' Application for Writ of Error, no reversible error. That a determination of the matters contained in Petitioners' Second Motion for Rehearing is essential to the disposition of this cause. The granting of this Motion for Leave to File is supported by this court's decision in *Puryear v. Porter*, 264 S.W.2d 689 (Tex. 1954).

WHEREFORE, PREMISES CONSIDERED, Petitioners respectfully move the Court that they be granted leave to file Second Motion for Rehearing herein.

Respectfully submitted,

CARTER, JONES, MAGEE,
RUDBERG, MOSS & MAYES

By /s/ JOE HILL JONES

Joe Hill Jones
State Bar Card
No. 10915000

2400 One Main Place
Dallas, Texas 75250
(214) 742-6261

ATTORNEYS FOR PETITIONERS

[Certificate of service omitted in printing].

EXHIBIT "A"

[Caption omitted in printing]

PETITIONERS' SECOND MOTION FOR REHEARING

TO SAID HONORABLE COURT:

It has come to the attention of Petitioners that this Court follows the rule of three in determining whether or not to grant an Application for Writ of Error. In this connection, we cite article contained in the Texas Bar Journal, Vol. 44, No. 6, June, 1981, styled "Advocacy In The Texas Supreme Court" by Chief Justice Joe R. Greenhill, wherein the following is stated at page 626:

> "All nine of us sit on every application. If three of us are of the tentative view that the *judgment* of the court of civil appeals is wrong, the writ will be granted."

If there is any statute or rule of civil procedure setting forth the rule of three, same is wholly unknown to these Petitioners. Petitioners assume that such rule is probably one of administration that the Court itself uses:

With Chief Justice Greenhill's recusal, only eight members of the Court were left to determine the propriety of a grant of the Application for Writ of Error. This vacancy greatly increased the odds against the grant of the writ of error.

To the knowledge of Petitioners, no other person "learned in the law" was called upon to fill the vacant seat as mandated by article 5, §11 of the Texas Constitution, which, in part, reads:

> "When the Supreme Court, . . . or any member . . . shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes."

The combination of the rule of three and recusal by a member of the Court who has not been replaced works to the mathematical disadvantage of Petitioners.[1] Also to be considered is the human element.[2] Petitioners have unconsciously been denied constitutional protections guaranteed by the Constitution of the State of Texas as well as that due process required by the Constitution of the United States of America. Of course, these questions become moot upon the grant of the writ of error.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that the Court set aside its order refusing grant of writ of error, no reversible error, and grant writ of error reversing and remanding the cause to the Court of Civil Appeals pursuant to Rule 483, or set same for argument; or alternatively, to follow the provi-

---

1. It may be that the odds against Petitioners have been increased by one-ninth (11.11%), one-eighth (12.5%), or the difference. An odds-maker tells me it is 9 divided by 8.

2. Remember the Henry Fonda movie "Twelve Angry Men"?

sions of article 5, §11 of the Constitution of the State of Texas and then reconsider the matter.

Respectfully submitted,

CARTER, JONES, MAGEE,
RUDBERG, MOSS & MAYES

By /s/ JOE HILL JONES

Joe Hill Jones
State Bar Card
No. 10915000

2400 One Main Place
Dallas, Texas 75250
(214) 742-6261

ATTORNEYS FOR PETITIONERS

[Certificate of service omitted in printing].

APPENDIX E

[hand writing "Received July 9, 1981 (not filed)" omitted in printing].

[Caption omitted in printing].

PETITIONERS' SECOND MOTION FOR REHEARING

TO SAID HONORABLE COURT:

It has come to the attention of Petitioners that this Court follows the rule of three in determining whether or not to grant an Application for Writ of Error. In this connection, we cite article contained in the Texas Bar Journal, Vol. 44, No. 6, June, 1981, styled "Advocacy In The Texas Supreme Court" by Chief Justice Joe R. Greenhill, wherein the following is stated at page 626:

> "All nine of us sit on every application. If three of us are of the tentative view that the *judgment* of the court of civil appeals is wrong, the writ will be granted."

If there is any statute or rule of civil procedure setting forth the rule of three, same is wholly unknown to these Petitioners. Petitioners assume that such rule is probably one of administration that the Court itself uses.

With Chief Justice Greenhill's recusal, only eight members of the Court were left to determine the propriety of a grant of the Application for Writ of Error. This vacancy greatly increased the odds against the grant of the writ of error.

To the knowledge of Petitioners, no other person "learned in the law" was called upon to fill the vacant

seat as mandated by article 5, §11 of the Texas Constitution, which, in part reads:

> "When the Supreme Court, . . . or any member . . . shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes."

The combination of the rule of three and recusal by a member of the Court who has not been replaced works to the mathematical disadvantage of Petitioners.[1] Also to be considered is the human element.[2] Petitioners have unconsciously been denied constitutional protections guaranteed by the Constitution of the State of Texas as well as that due process required by the Constitution of the United States of America. Of course, these questions become moot upon the grant of the writ of error.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that the Court set aside its order refusing grant of writ of error, no reversible error, and grant writ of error reversing and remanding the cause to the Court of Civil Appeals pursuant to Rule 483, or set same for argument; or alternatively, to follow the provisions

---

1. It may be that the odds against Petitioners have been increased by one-ninth (11.11%), one-eighth (12.5%), or the difference. An odds-maker tells me it is 9 divided by 8.

2. Remember the Henry Fonda movie "Twelve Angry Men"?

of article 5, §11 of the Constitution of the State of Texas and then reconsider the matter.

Respectfully submitted,

CARTER, JONES, MAGEE,
RUDBERG, MOSS & MAYES

By /s/ JOE HILL JONES
State Bar Card No. 10915000

2400 One Main Place
Dallas, Texas 75250
(214) 742-6261

ATTORNEYS FOR PETITIONERS

[Certificate of Service Omitted in Printing]

APPENDIX F

[Letterhead of Supreme Court of Texas
omitted in printing]

July 15, 1981

Joe Hill Jones, Attorney
Carter, Jones, Magee, Rudberg
Moss & Mayes
2400 One Main Place
Dallas, Texas 75250

RE: B-9689, JIMMY D. PICKETT ET AL vs.
REPUBLIC NATIONAL BANK OF DALLAS

Dear Mr. Jones,

The second motion for rehearing of application for writ of error in the above styled case was received and referred to the Court.

There being no provision in the Texas Rules of Civil Procedure for a second motion for rehearing, the Court has instructed that same not be filed and returned to movant.

Very truly yours,

GARSON R. JACKSON, Clerk

Claire Keefe,
Deputy Clerk

Encs: Petitioners' motion for leave to file second motion for rehearing
Second motion for rehearing

CC: David S. Kidder, Atty.

APPENDIX G

AFFIDAVIT

THE STATE OF TEXAS)
:
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared CLINTON FOSHEE, who upon oath did state as follows:

My name is Clinton Foshee. I was the Petitioner in Cause No. B-9619, styled "Clinton Foshee, et al vs. Republic National Bank of Dallas, Trustee, et al", in the Supreme Court of Texas, which is reported in 617 S.W.2d 675.

On January 7, 1981, I appeared before the Supreme Court of Texas at Austin, Texas, when oral arguments were held in the above styled case. My case was the first case to be argued that day before the Supreme Court of Texas.

Just prior to argument, Chief Justice Joe R. Greenhill announced that he was not sitting in the case because his wife was a stockholder in the Republic National Bank of Dallas, Texas, and that dividend income therefrom under the laws of Texas would constitute community property and that he therefore had a financial interest in one of the litigants before the Court. After making such statement, he withdrew from the Bench. Subsequent opinions written by the Court indicate that Chief Justice Joe R. Greenhill in no way participated.

Further, Deponent saith not.

/s/ CLINTON FOSHEE
Clinton Foshee

SWORN TO AND SUBSCRIBED BEFORE ME by the said CLINTON FOSHEE, on this, the 2nd day of September, 1981, to certify which witness my hand and seal of office.

[Jurat omitted in printing].

AFFIDAVIT OF CLINTON FOSHEE, SOLO PAGE

APPENDIX H

[Letterhead of Supreme Court of Texas omitted in printing].

September 1, 1981

Mr. Joe Hill Jones, Atty.
CARTER, JONES, MAGEE, RUDBERG,
MOSS & MAYES
2401 One Main Place
Dallas, Texas 75250

Dear Mr. Jones,

You inquired why Chief Justice Greenhill did not sit in the case of *Foshee v. Republic National Bank of Dallas*, No. B-9619.

Mrs. Greenhill's father, the late H. D. Shuford of Tyler, left her some shares of stock in the Republic National Bank. It is her separate property, but the dividends are community property. Chief Justice Greenhill felt that it would be appropriate for him to recuse himself under these circumstances.

Very truly yours,

/s/ RICHARD P. BRAUN,
Deputy Clerk

Opposition

Office - Supreme Court, U.S.
FILED
NOV 27 1981
ALEXANDER L. STEVAS
CLERK

No. 81-784

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JIMMY D. PICKETT, R. G. CARTER, and FRANK J. DAVIES, as Co-Executors of the Estate of CLAIRE BENZ-STODDARD, Deceased, and as Trustees of the VAUGHN BENZ AYERS TRUST and the ALLEN BENZ TRUST,
Petitioners,

vs.

REPUBLIC NATIONAL BANK OF DALLAS, Trustee,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

DAVID S. KIDDER
GERALD H. GRISSOM
2300 Republic National Bank Building
Dallas, Texas 75201
214/655-7500
Counsel for Respondent

REPUBLIC NATIONAL BANK OF DALLAS, Trustee

Of Counsel:
THOMPSON & KNIGHT
2300 Republic National Bank Building
Dallas, TX 75201

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Whether Pickett failed to timely raise his due process complaint.

Whether the Texas Supreme Court denied Pickett, *et al.*, due process of law, when it refused application for writ of error in a per curiam opinion by eight justices, one justice not sitting.

PARTIES TO THE PROCEEDINGS

The names of all parties to this proceeding are contained in the caption of the case in this Court.

TABLE OF CONTENTS

Page

Counter Statement of Questions Presented i

Parties to the Proceedings i

Table of Contents ii

Table of Authorities iii

Statement of the Case 2

Summary of Argument 3

Reasons for Denying Certiorari 4

I. Certiorari should be denied because Pickett failed to timely raise his "constitutional" complaint 4

II. The Supreme Court of Texas accorded Pickett due process of law in its consideration and refusal of application for writ of error.

A. The procedure in Texas for granting writ of error is essentially discretionary 6

B. As long as there is a quorum on the appellate bench, there is no implied right to a replacement judge 8

C. The "Rule of Three" applied by Texas Supreme Court in deciding whether to grant Writ of Error is substantially similar to the "Rule of Four" used by the United States Supreme Court in determining whether to grant Writ of Certiorari 11

D. Pickett has failed to raise an issue of constitutional proportion 12

Conclusion 14

Certificate of Service 15

TABLE OF AUTHORITIES

Page

Cases:

Bloethe v. New York,
_____ U.S. _____, 82 S.Ct. 661,
7 L.Ed.2d 780 (1962) 5

Cardinale v. Louisiana,
394 U.S. 437, 89 S.Ct. 1161,
22 L.Ed.2d 398 (1969) 5

Hankerson v. North Carolina,
432 U.S. 233, 238, n. 3, 97 S.Ct. 2339,
53 L.Ed.2d 306, 312, n. 3 (1977) 5

Hoyt v. Hoyt,
351 S.W.2d 111 (Tex. Civ. App. — Dallas
1961, writ dism'd) 10

Michigan v. Tyler,
436 U.S. 499, 512, n. 7; 98 S.Ct. 1942,
56 L.Ed.2d 486, 500, n. 7 (1978) 5

Nalle v. City of Austin,
85 Tex. 520, 22 S.W. 668 (Tex. 1893) 9

Street v. New York,
394 U.S. 576, 582, 89 S.Ct. 1354,
22 L.Ed.2d 572, 579 (1969) 5

Tacon v. Arizona,
410 U.S. 351, 93 S.Ct. 998,
35 L.Ed.2d 346 (1973) 5

Texas Constitution:

Art. 5, §11 9

Art. 5, §2 10

Page

Texas Rules of Civil Procedure:

Tex. R. C. P. 467 7

Tex. R. C. P. 483, 500, 505 7

Other Authorities:

Black's Law Dictionary (Rev'd 4th Ed 1968) 11

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Greenhill, "Presentation of a Case to the Supreme Court of Texas" 38 Tex. L. Rev. 538, 543 (1960) 4

12 *Moore's Federal Practice* §400.05-2[3] 12

Stern & Gressman, *Supreme Court Practice* (1978) 12

Walker, *Appellate Procedure in Texas* (Tex. Bar Found. 2d Ed 1979) 7

No. 81-784

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JIMMY D. PICKETT, R. G. CARTER, and FRANK J. DAVIES, as Co-Executors of the Estate of CLAIRE BENZ-STODDARD, Deceased, and as Trustees of the VAUGHN BENZ AYERS TRUST and the ALLEN BENZ TRUST,

Petitioners,

vs.

REPUBLIC NATIONAL BANK OF DALLAS, Trustee,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This lawsuit was originally brought by Republic National Bank of Dallas, Trustee ("Republic") against Jimmy D. Pickett, R. G. Carter, and Frank J. Davies, as Co-Executors of the Estate of Claire Benz-Stoddard, Deceased, and as Trustees of the Vaughn Benz Ayers Trust and the Allen Benz Trust ("Pickett"), for the restitution of funds mistakenly paid. After Republic moved for summary judgment, the trial court sustained the motion and rendered judgment for Republic, and the Court of Civil Appeals affirmed in Pickett, et al. v. Republic National Bank of Dallas, 601 S.W.2d 405 (Tex. Civ. App. — Tyler 1980, writ ref'd n.r.e.). Pickett applied for Writ of Error from the Texas Supreme Court, but the application was denied on May 27, 1981, in a per curiam opinion (Petitioners' Brief, Appendix A) of eight justices, which noted that one justice was not sitting. The reason for the justice not sitting, be it illness, absence, or recusal, is immaterial to any issue herein.

Pickett filed his first Motion for Rehearing on June 10, 1981, rehashing the same legal arguments which had already failed to convince three different courts. No mention, or even the hint of an allusion, was made to the so-called "due process" issue surrounding the "Rule of Three" which Pickett purports to bring to this Honorable Court on petition for Writ of Certiorari (See Appendix B of Petitioners' Brief).

Only *after* the Texas Supreme Court denied the motion for rehearing on June 30, 1981 (See Petitioners' Appendix C), did Pickett attempt to file Motion for Leave to File Second Motion for Rehearing (Petitioners' Appendix D). Because there is no provision for such a motion, the Texas Supreme Court "instructed that same not be filed and returned to [Pickett]." (Petitioners' Appendix F).

SUMMARY OF ARGUMENT

I. Certiorari should be denied because Pickett failed to timely raise his "constitutional" complaint.

II. The Supreme Court of Texas accorded Pickett due process of law in its consideration and refusal of application for writ of error:

A. The procedure in Texas for granting writ of error is essentially discretionary.

B. As long as there is a quorum on the appellate bench, there is no implied right to a replacement judge.

C. The "Rule of Three" applied by Texas Supreme Court in deciding whether to grant writ of error is substantially similar to the "Rule of Four" used by the United States Supreme Court in determining whether to grant writ of certiorari.

D. Pickett has failed to raise an issue of constitutional proportion.

REASONS FOR DENYING CERTIORARI

I. Certiorari should be denied because Pickett failed to timely raise his "constitutional" complaint.

The Texas Supreme Court delivered its per curiam opinion on May 27, 1981 (Petit. App. A); the opinion noted that Chief Justice Greenhill was not sitting. (The reason Justice Greenhill did not participate is wholly immaterial, since the gist of Pickett's complaint is purely mathematical in nature.) Pickett filed his Motion for Rehearing on June 12, 1981, which rehashed the old arguments on the merits, and completely omitted any allusion to the so-called "due process" complaint raised in the Petition for Certiorari. (Petit. App. B) Only *after* Pickett's Motion for Rehearing was overruled on June 30, 1981 (Petit. App. C), and the judgment became final, did Pickett take up the constitutional torch in his Motion for Leave to File Second Motion for Rehearing, which was submitted (but not filed) on July 8, 1981 (Petit. App. D, E). The Texas Supreme Court refused even to file, much less to consider, Pickett's Second Motion for Rehearing because the Texas Rules of Civil Procedure have no provision for such a motion. (Petit. App. F)

The *only* instance in which the Texas Supreme Court permits a *second* motion for rehearing is when the Court has issued a written opinion *after* the *first* motion for rehearing. Greenhill, *"Presentation of a Case to the Supreme Court of Texas,"* 38 Tex. L. Rev. 538, 543 (1960). There being no second written opinion, Pickett lacked the procedural predicate from which to launch a second motion for rehearing.

Therefore, Pickett failed, under the state procedural rules, to timely bring his constitutional complaint to the attention of the Texas Supreme Court. In essence, Pickett

raises the due process claim for the first time in his Petition for Certiorari.

Where an issue is neither raised by petitioner nor passed on by the highest state court, this Court has consistently acknowledged its inability to pass on such an issue raised for the first time in Petition for Certiorari. *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969); *Tacon v. Arizona*, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973). Where the highest state court does not pass upon a federal issue, it is *presumed* that the omission was due to want of proper presentation in the state courts. *Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 22 L.Ed.2d 572, 579 (1969). This Court refused to address an issue (concerning a jury instruction) which the North Carolina Supreme Court held had not been "properly presented" to it. *Hankerson v. North Carolina*, 432 U.S. 233, 238, n. 3, 97 S.Ct. 2339, 53 L.Ed.2d 306, 312, n. 3 (1977); see also *Michigan v. Tyler*, 436 U.S. 499, 512, n. 7; 98 S.Ct. 1942, 56 L.Ed.2d 486, 500, n. 7 (1978).

Pickett, having defaulted procedurally in the state court, should not now be afforded the opportunity to pursue his appeal by afterthought. In *Bloethe v. New York*, _____ U.S. _____, 82 S.Ct. 661, 7 L.Ed.2d 780 (1962), this Court denied application for Certiorari, specifically holding that it was without jurisdiction to consider issues not proposed for review below until a "*second* motion for argument."

In light of Pickett's clear failure to timely raise the issue presented, the Court would be well justified in denying Pickett's Certiorari out of hand on this basis alone.

II. The Supreme Court of Texas accorded Pickett due process of law in its consideration and refusal of application for writ of error.

The thrust of Petitioner's application for writ of certiorari is that the Texas Supreme Court, by applying the "Rule of Three" in determining whether to grant Writ of Error, somehow denied due process of law to Petitioner, although eight justices of the Texas Supreme Court apparently concurred in denying the writ. Respondent disagrees.

The Texas Supreme Court utilizes the "Rule of Three" to determine whether, in its discretion, even to grant an application for Writ of Error, much as the United States Supreme Court relies on the "Rule of Four" in deciding whether, in its discretion, to grant Writ of Certiorari. Petitioner had a meaningful opportunity to be heard by more than a quorum of the Texas Supreme Court and thus, Respondent suggests, brings no colorable issue of denial of due process to this Honorable Court.

A. The procedure in Texas for granting Writ of Error is essentially discretionary.

Contrary to Pickett's apparent suggestion that the procedure for applying for Writ of Error is an "appeal of right" (Petitioners' Brief, p. 9), the process involves considerably more discretion than an otherwise automatic right to a comprehensive review by an appellate court of a lower court's judgment and decision thereon. The standard for granting writ of error is thus described by the Texas Rules of Civil Procedure:

> "The Supreme Court may review final judgments of Courts of Civil Appeals upon Writ of Error, *when good cause therefor* be shown by application..."

Tex. R. Civ. P. 467. [Emphasis supplied].

In determining the threshold question of whether the application should be granted, "[i]f as many as three justices so vote, the application is granted and the cause is put on the submission docket." Walker, *Appellate Procedure in Texas* §27.9 (Tex. Bar Found. 2d Ed 1979).

Chief Justice Greenhill of the Texas Supreme Court describes the process of considering whether to allow a Writ of Error thus:

> "All nine of us sit on every application. If three of us are of the tentative view that the *judgment* of the court of appeals is wrong, the writ will be granted. Occasionally, we grant applications on the importance of a question....We are getting more applications this year than last. The odds of a writ being granted is about one in six or seven."

Greenhill, *"Advocacy in the Texas Supreme Court"*, 44 Tex. B. J. 624, 628 (1981).

A dissatisfied litigant in state court has the right to have a Texas Court of Civil Appeals hear and rule on his complaints of the judgment of the trial court judge, but it is apparent, from the foregoing, that the process which winnows out seventy to eighty-five percent of all applications for Writ of Error is, in essence, a discretionary one. Only after the Writ is granted does the entire Court decide the case on its merits. *See* Tex. R. Civ. P. 483, 500, 505.

Texas jurisprudence employs a series of notations by the Supreme Court in indicating its action on application for writ of error:

> In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will

> refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application with the notation "Refused. No reversible Error." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation "Dismissed for Want of Jurisdiction."

Tex. R. Civ. P. 483. Thus, where the Writ is refused with the notation "No reversible error," (as was the case presented here), the Texas Supreme Court allows the result to stand *without endorsing the rationale* of the Court of Civil Appeals. Such cases thus have obviously debatable value as precedents, notwithstanding Petitioners' assertion to the contrary on pp. 9-10 of their brief.

B. As long as there is a quorum on the appellate bench, there is no implied right to a replacement judge.

The Texas Constitution provides for instances in which a judge of the Supreme Court or Court of Civil Appeals should be replaced in a given case:

> Sec. 11. No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case. When the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, or any member of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the *requisite number* of persons learned in

> the law *for the trial and determination of such cause or causes.* When a judge of the District Court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law.
>
> And the District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. This disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled as may be prescribed by law. As amended Aug. 11, 1981, proclamation Sept. 22, 1891.

Tex. Const. art. 5, §11. (emphasis supplied).

The courts in Texas have construed this provision to require a replacement judge, *not* in *every* case where a judge is disqualified or absent, but *only* in those cases in which an additional judge is *necessary* to reach a decision. *Nalle v. City of Austin*, 85 Tex. 520, 22 S.W. 668 (Tex. 1893). In *Nalle* the Texas Supreme Court decided *against* the "implied right of replacement" suggested by Petitioners 98 years ago, reasoning thus:

> Why, if two members of the court make a quorum, should a third be appointed in a case in which the two may concur in a decision? There can be none. But there is a necessity for an appointment when the two judges who are qualified may disagree... Under the original section a special judge could be appointed only when two members of a court were disqualified, and the other two failed to concur as to the decision of the case. The amended section obviates this difficulty by providing for an appointment when one only is disqualified. It does not follow that an appointment is to be made in every such case. The requirement is that the governor

> "shall commission the requisite number * * * for the trial and determination of such cause." If three were required to make a quorum, then, one being disqualified, another would be necessary to make the requisite number to decide the cause. So, also, if one be disqualified, and the other two disagree, the appointment of a special judge is requisite to enable the court to make a decision, although two may constitute a quorum. But if two be a quorum, and two be qualified, and able to agree, no additional judge is requisite to a decision of the case, although the third member of the court be recused. So construed, we see a satisfactory and sufficient reason for the change made by the amendment.

Id. at 671. The principle that the remaining judges, providing they constitute a quorum, may lawfully proceed with disposition of the case has been vindicated more recently in *Hoyt v. Hoyt*, 351 S.W.2d 111 (Tex. Civ. App. — Dallas 1961, writ dism'd).

Given that there is no right to a replacement judge under the Texas Constitution as long as there is a quorum, the only remaining question is the number required for a quorum on the Texas Supreme Court. Again, the Texas Constitution speaks clearly to this:

> The Supreme Court [of Texas] shall consist of a Chief Justice and eight Associate Justices, *any five of whom shall constitute a quorum*, and the concurrence of five shall be necessary to a decision of a case; provided, that when the business of a court may require, the *court may sit in sections* as designated by the court to hear argument of causes *and to consider applications for writs of error...*

Tex. Const. art. 5, §2 (emphasis supplied).

The Texas Constitution would allow a panel of a lesser number than the whole, internally designated, to determine

the Supreme Court's action on application for Writ of Error. All that is required to decide a case *on its merits* is the concurrence of five justices.

Pickett complains because his application for writ was "refused, no reversible error" apparently by *eight members* of the Texas Supreme Court in a *per curiam* opinion.[1] Not only did Pickett's application for Writ of Error have full benefit of the attention of *more* than a small sub-panel of the court, *more* even than the quorum requisite to decide a case on its merits, (which the Court did not reach), but also the application, apparently failing to receive even one affirmative vote on granting the writ, was ostensibly unanimously refused by eight members of the court. Pickett received much, much more "due process" than the minimum prescribed by the United States Constitution.

C. The "Rule of Three" applied by Texas Supreme Court in deciding whether to grant Writ of Error is substantially similar to the "Rule of Four" used by the United States Supreme Court in determining whether to grant Writ of Certiorari.

This Court's application of its own "Rule of Four" is described thus:

> "It has become established as a general rule that the affirmative vote of only four Justices are necessary to grant a petition for writ of certiorari. The rule is also followed where only eight Justices participate in the consideration of a petition. On rare occasions, as where only six or seven Justices are eligible or available, the rule is sometimes but not invariably relaxed so as to permit the granting of certiorari on the vote of only three Justices..."

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[1] "*Per curiam*": A phrase used in the reports to distinguish an opinion of the whole court from an opinion written by any one judge. Black's Law Dictionary (Rev'd 4th Ed 1968).

Stern & Gressman, *Supreme Court Practice* 5.4 (5th Ed. 1978). *See also, 12 Moore's Federal Practice* §400.05-2[3].

The "Rule of Three" applied by the Texas Supreme Court to determine whether to grant applications for Writ of Error is obviously very similar to the "Rule of Four" used by the United States Supreme Court as a rule of thumb to grant Certiorari.

The burden on a petitioner to obtain Writ of Error is actually *easier* than that to obtain certiorari; *i.e.*, one must receive three votes to get Writ of Error granted in Texas and four in the United States Supreme Court. The Texas Supreme Court ostensibly applied its "Rule of Three" when only eight justices were sitting, in the same manner that this Court does when one of its nine justices is not available or eligible. If the United States Supreme Court's "Rule of Four" comports with the requirements of due process, as it presumptively does, then the even more lenient "Rule of Three" applied in Texas should be *less*, not more vulnerable to attack on due process grounds.

D. Pickett has failed to raise an issue of constitutional proportion.

Pickett has not shown any demonstrable harm as a result of the denial of Writ of Error. Surely more is required to raise constitutional doubts about an internal procedure of the Texas Supreme Court than the argument that the odds of granting writ are reduced as "a mathematical certainty" (Petitioners' Brief p. 15). The merits and significance of the application for Writ surely have a higher correlation with its being granted or refused than statistical probability; otherwise, the valuable time of the court could be saved by tossing nine pennies for every application, and granting only those where three or more turn up heads.

The statistical argument underlying the due process attack on the "Rule of Three" applies equally to the "Rule of Four" in this Court. The so-called "differences" between the two rules (Petitioners' Brief p. 10), except that the Rule of Three lessens the applicant's burden, are distinctions of doubtful *existence or significance.*

Pickett's analogies to *other* areas in which the United States Supreme Court has defined the requirements of due process are completely inapposite. Petitioner has cited many cases from different arenas in which this Court has determined the requirements of due process; but the opinions have no discernible relation to a review of the judicial exercise of what is essentially discretion to grant or refuse Writ of Error. Thus no attempt will here be made to meet the negative burden of stating why each such case has no bearing on the issue under consideration. Voting rights opinions and cases involving non-unanimous jury verdicts cited by Pickett have no meaningful connection to the judicial process for determining the threshold question of whether to grant or deny Writ, and Pickett certainly elucidates no coherent nexus. The exercise of what is essentially judicial discretion cannot be evaluated statistically in the way that legislatures should be representative of their constituencies; certainly, Pickett fails to elucidate "one good reason" why this comparison is meaningful. Likewise, the Texas Supreme Court is not a jury; unanimity is not required for it to decide a case, nor could such a requirement be practically imposed.

Further, Pickett has wholly failed to demonstrate that the relief requested would in any way work a potentially different result for him. Something a bit more authoritative than reference to the movie, "Twelve Angry Men", (Petitioner's Brief, 13 n. 18) is required to show that the "Rule of Three", as applied, arbitrarily denied Pickett due process of

law. The logical extensions of the rule Pickett would have the Court construct are manifold and absurd.[2]

CONCLUSION

Petitioner has failed to timely raise or demonstrate any significant issue justifying review on Writ of Certiorari. More than a quorum of the Supreme Court of Texas applied a long-recognized procedure in considering and refusing application for Writ of Error, which is similar to, though more lenient than, the time-honored process by which this Honorable Court itself determines whether to grant or deny Writ of Certiorari. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAVID S. KIDDER
GERALD H. GRISSOM
2300 Republic National
Bank Building
Dallas, Texas 75201
214/655-7500
Counsel for Respondent

Of Counsel:

THOMPSON & KNIGHT
Republic National
Bank Building
Dallas, Texas 75201

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[2]For Example: A court rules on the merits 5-3, one abstaining. Pickett's argument would replace the one abstainer because he "might," "theoretically" convince two in the majority to change their decision.

CERTIFICATE OF SERVICE

I, David S. Kidder, a member of the Bar of the Supreme Court of the United States, certify that, pursuant to the provisions of Rule 28 of the Rules of the Supreme Court of the United States, three (3) copies of the foregoing Brief in Opposition have been served upon counsel for Petitioners, John E. Agnew and Charles M. Wilson III, Carter, Jones, Magee, Rudberg, Moss & Mayes, 2400 One Main Place, Dallas, Texas 75250, by depositing such in the United States Post Office, with first class postage pre-paid, addressed to counsel of record at their post office address. I further certify that all parties required to be served have been served.

Dated: November 20, 1981

DAVID S. KIDDER